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NO.

**THE SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1983

**HYATT HOTELS CORPORATION, d/b/a
HYATT REGENCY NEW ORLEANS,**

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**On Writ of Certiorari to the
United States Court Of Appeals for the Eleventh Circuit**

PETITION

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QUESTIONS PRESENTED FOR REVIEW

Questions Addressed to the Supervisory Power of the Court

Whether the NLRB decision is contrary to the law and facts, requiring denial of enforcement, as being arbitrary and capricious and a misapprehension or gross misapplication of the standard for unit determinations (*Golden State Bottling Co., Inc. v. NLRB*, 340 U.S. 474 (1951), to wit:

- A. The unit selected by the NLRB is totally inappropriate for the highly integrated HYATT luxury, convention hotel,

where—

- (1) The unit selected for HYATT by the NLRB in 1981 is inconsistent with:
- The prior unit determination at this HYATT;
 - The collective bargaining pattern and practice at other major hotels in New Orleans;
 - The history of hotel unit determinations in NLRB Region 15;
 - All other representation proceedings at HYATT Hotels in the Southeastern United States;
 - All other unit determinations at all other HYATTS throughout the United States which do not have collective bargaining relationships;
 - Collective bargaining agreements at all HYATTS throughout the United States which do have collective bargaining agreements;
 - The consistent and unified labor relations policies of HYATT throughout all union and non-union hotels in the United States;
 - All hotels and hotel associations in major U.S. cities engaged in collective bargaining;

and where—

- (2) There are no distinct, shared interests among employees in the unit certified which are not shared by *all* employees of HYATT.

B. The NLRB violated the Administrative Due Process Rights of HYATT and its employees by:

- (1) Reversing the prior "all employee" unit determination at HYATT where there was no change in any of the facts except for the person occupying the position of

Regional Director;

- (2) Failing to follow the prior unit determination at the same HYATT Hotel as the Board has done at other HYATTS;
- (3) Departing from its standard of following prior unit determinations at the same hotel as applied throughout the hotel industry;
- (4) Disenfranchising 850 employees at HYATT previously accorded their right to vote under 29 U.S.C. § 157.

Questions Presenting Conflict Among the Circuits

- 1. Whether there is an established policy of "all employee" units (single unit representation) for manual employees in highly integrated hotel operations consistent with *Hotel Equities, d/b/a The Regency Hyatt House*, 171 NLRB 1347 (1968), except where there is a well defined area bargaining practice to the contrary.
 - A. Yes: *Atlas Hotels, Inc. v. NLRB*, 519 F.2d 1330 (9th Cir. 1975); *Ramada Inns, Inc. v. NLRB*, 487 F.2d 1334 (9th Cir. 1973); *Westward-Ho Hotel Co. v. NLRB*, 437 F.2d 1110 (9th Cir. 1971).
 - B. No: *Hyatt Hotels Corporation, d/b/a Hyatt Regency New Orleans v. NLRB*, the case *sub judice*.
 - C. Other circuits have found to the contrary in other hotel/motel cases, but have not been required to decide the issue in a highly integrated luxury, convention hotel such as HYATT. *Holly's Inc. d/b/a Holiday Inn South*, 653 F.2d 238 (6th Cir. 1981).
- 2. Whether the NLRB must assign a relative weight to each of the competing factors it considers, analyzed in light of the policies underlying the "community of interest" test, and support its appraisal of the significance of each factor.

A. Yes: *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153 (5th Cir. 1980).

B. No: *Hyatt Hotels Corporation, d/b/a Hyatt Regency New Orleans v. NLRB*, (11th Cir. No. 82-8146), the case *sub judice*.

Important Question of Federal Law

Whether a unit of less than all manual employees in a highly integrated luxury, convention hotel such as HYATT violates the intent and purpose of the National Labor Relations Act.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The following is a complete list of all parties to the proceedings in this case:

- (1)** Hyatt Regency New Orleans
- (2)** Hyatt Hotels Corporation
- (3)** United Labor Unions
- (4)** National Labor Relations Board

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REFERENCES TO OPINIONS AND ORDERS IN COURTS AND ADMINISTRATIVE AGENCIES BELOW

On July 12, 1977, a petition was filed with Region 15 of the National Labor Relations Board [hereinafter referred to as the Board or NLRB] by the Hotel, Motel & Restaurant Employees, Local No. 166, AFL-CIO, and the International Union of Operating Engineers, Local No. 226, AFL-CIO, seeking to represent some, but not all, of the employees at the Hyatt Regency New Orleans [HYATT]. Hearings on that petition, NLRB Case No. 15-RC-6147, were held during which HYATT introduced substantial documentary and testimonial evidence regarding the functional integration and community of interests of all employees at HYATT.

On September 9, 1977, Regional Director Charles M. Paschal, Jr., issued his Decision and Direction of Election finding that the appropriate unit at HYATT for collective bargaining purposes included:

All full-time and regular part-time employees, including banquet, beverage, concierge, convention services, engineers, housekeeping, kitchen, laundry/valet, PBX, restaurant, roomservice, service department, Stadium Club, and steward employees.¹

That unit was patterned after the unit of all manual operating employees found appropriate by the Board at the Hyatt Regency Atlanta [*Hotel Equities, d/b/a The Regency Hyatt House*, 171 NLRB 1347 (1968)], a unit which has maintained a long collective bargaining history and still exists at the Hyatt Regency Atlanta.

¹Hereinafter referred to as the 1977 unit. *Hyatt Corporation, d/b/a Hyatt Regency New Orleans*, NLRB Case No. 15-RC-6147 (1977).

On March 16, 1981, the United Labor Unions, Local 100 [hereinafter ULU], filed a petition with Region 15 of the Board for a representation certification election as the collective bargaining representative *only* for housekeeping and laundry/valet employees at HYATT.

During the unit determination hearings HYATT introduced into evidence the *entire record* of the hearings in NLRB Case No. 15-RC-6147, including the complete transcript and exhibits utilized by HYATT to demonstrate the functional integration and community of interest of all HYATT employees. Thus, all evidence Regional Director Charles M. Paschal, Jr., utilized in making his 1977 decision was introduced and reviewed without objection in 1981.

Furthermore, HYATT introduced evidence which updated all exhibits from the date of the 1977 hearings to 1981. This included documentary evidence of functional integration and cross-utilization, as well as testimony of all individuals in key supervisory positions since the opening of the Hotel: General Manager, Executive Assistant Manager—Rooms, Executive Housekeeper, and Personnel Director.

On May 26, 1981, Regional Director Fred A. Lewis, the new Regional Director for Region 15, issued his decision which excluded most employees included in the 1977 unit. Similar to the petition of ULU, the 1981 unit included only:

All full-time and regular part-time employees in the employer's housekeeping, laundry/valet, concierge and bell staff departments.²

On June 4, 1981, HYATT petitioned the Board for review of the appropriateness of this unit. This case consisted of a 717-

²Hereinafter referred to as the 1981 unit. [VII:923], see note 7.

page transcript and 37 exhibits. HYATT's request was denied without explanation by mailgram on June 19, 1981.

On June 16, 1981, HYATT requested that all employees in the 1977 unit be permitted to vote in the 1981 election, even if by challenged ballot. Regional Director Lewis denied this request on June 17, 1981.

On June 18, 1981, HYATT filed a complaint for a temporary restraining order, preliminary and permanent injunction seeking to permit all employees in the 1977 unit to vote, even by challenged ballot.³ At the June 20, 1981, hearing on the temporary restraining order the NLRB presented its mailgram Order of June 19, 1981. At the July 1, 1981, hearing on the preliminary injunction, the NLRB's motion to dismiss the complaint for lack of jurisdiction was granted, thus delaying judicial review until the filing of this Petition for Review by HYATT.

On June 30, 1981, a Supplemental Hearing was held by Regional Director Lewis, who issued his decision on July 13, 1981, maintaining the same 1981 unit. HYATT petitioned for review of this decision on July 21, 1981. Following a July 29, 1981, notification of the election by Regional Director Lewis, the Board issued a mailgram denial of HYATT's Petition for Review on August 4, 1981.

On August 11, 1981, an election was held at the office of Regional Director Lewis in which a majority of the ballots cast in the 1981 unit were for representation by ULU, with none of the 1977 unit employees being permitted to vote. On September 21, 1981, ULU was certified as the collective bargaining representative of the 1981 unit over the objection of HYATT.

³*Hyatt Regency New Orleans v. National Labor Relations Board, et al., Case No. 81-2482 (E.D.La., dismissed, July 8, 1981).*

Subsequently, ULU demanded that HYATT engage in collective bargaining with ULU over the 1981 unit. HYATT refused, *as refusal was the only means to contest the Board's decision*. The Board then issued an unfair labor practice complaint in NLRB Case No. 15-CA-8351-2 on November 16, 1981. On February 26, 1982, the NLRB granted the summary judgment motion of its General Counsel and issued its Order, requiring HYATT to bargain collectively with ULU over the 1981 unit.⁴

HYATT petitioned the United States Court of Appeals for the Eleventh Circuit in the most expeditious manner provided by law to seek review of the arbitrary and factually unsupported Order of the NLRB, pursuant to 29 U.S.C. §160(f). Oral argument was held on March 24, 1983.

On June 21, 1983 the panel hearing the case issued its decision granting enforcement of the NLRB Order.⁵ HYATT petitioned for Rehearing and for Rehearing *En Banc* on July 11, 1983, which was denied on August 25, 1983.⁶

⁴*Hyatt Regency New Orleans*, 260 NLRB No. 66 (1982).

⁵See Appendix A-1. Honorable Charles R. Scott, U.S. District Judge for the middle district of Florida, was a member of the panel that heard oral argument, but due to his death on May 12, 1983, did not participate in this decision.

⁶See Appendix A-2

GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Order granting enforcement of the Order of the National Labor Relations Board was issued by the United States Court of Appeals for the Eleventh Circuit on June 21, 1983 (App. at A-1.)

HYATT petitioned for rehearing and for rehearing *en banc* on July 11, 1983. Rehearing was denied by Order of the United States Court of Appeals for the Eleventh Circuit on August 25, 1983. (App. at A-2.)

The statutory provisions believed to confer upon this Court jurisdiction to review the judgment or decree in question by writ of certiorari are as follows: 28 U.S.C. §1254 (1); 28 U.S.C. §1651; 28 U.S.C. §2101; 28 U.S.C. §2106.

STATUTES INVOLVED IN THIS CASE

The statute involved in this case is the National Labor Relations Act, as amended, Sections 7, 9(b) and 9(c)(5). 29 U.S.C. §§157, 159(b), and 159(c)(5), as set out at Appendix A-3.

STATEMENT OF THE CASE

This is a case involving the determination of an appropriate collective bargaining unit for HYATT.

In 1977 the NLRB found an "all-employee" unit appropriate at HYATT. This was consistent with *every* prior Board decision affecting *every* luxury convention hotel in America, including *every* HYATT.

In 1981 a new Regional Director completely reversed the 1977 unit. The Board then conducted an election in the gerrymandered unit, thereby disenfranchising 850 HYATT employees permitted to vote in 1977.

The Board may not reverse a prior unit determination absent a showing of substantial change. Further, *every* NLRB unit determination must be supported by substantial evidence in the record. HYATT's overwhelming and totally unrebutted evidence precludes such inappropriate Board action.

Statement of the Facts

HYATT is a high quality, luxury, convention hotel, which is the fourth largest HYATT in the United States (R.37:6), and the second largest hotel of any kind in the Southeast. R.32:2.⁷ HYATT employs approximately 1100 employees (R.31:14) to service 1200 guest rooms (R.31:16), three restaurants and three lounges and over 50,000 square feet of banquet, conference and exhibition space. HYATT EX.s 1, 2, 4.

⁷The transcript of the representation proceeding is found in VOLUME I of the record, and references to it will be cited as R._____ :_____, indicating the page and line. HYATT Exhibits are found in VOLUMES II-VI and will be cited as HYATT EX._____. References to the pleadings in VOLUME VII will be shown as VII:_____, indicating the page number.

HYATT is physically connected to the Louisiana Superdome, the largest enclosed public assembly facility and sports arena in the world (R.31:8), which hosts many athletic events, shows and conventions. R.30:13. Approximately 80% of HYATT's business is convention-oriented. R.29:11; 249:13; 549:8.

HYATT is a 32-story hotel (R.29:30), centered around an expansive atrium lobby (R.30:5), conducive to contact among all employees and guests of HYATT. R.385:2-8.

1. HYATT's Organization

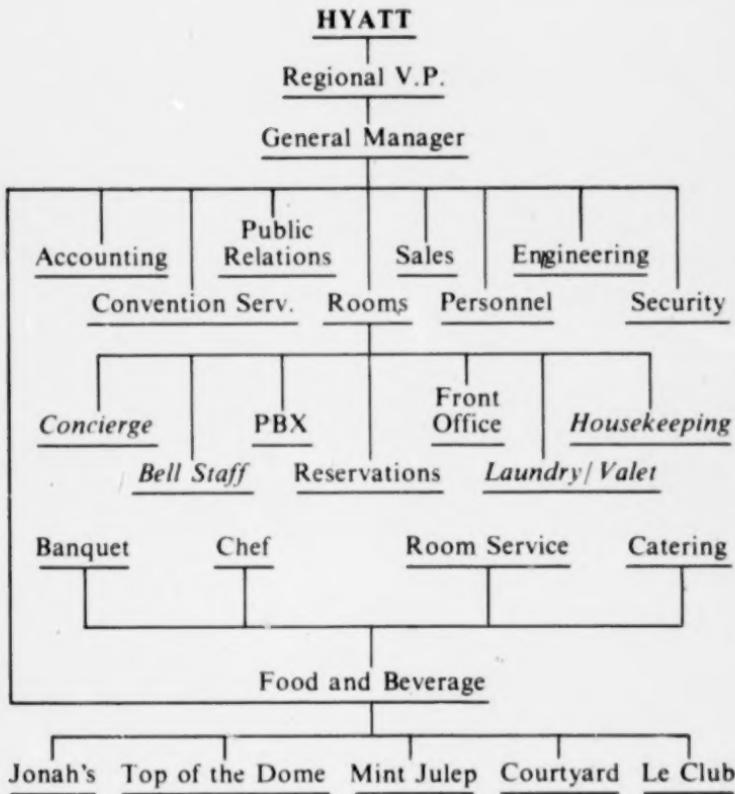
All HYATT employees work under the same general manager. R.38:5. The 4 departments which the NLRB found to be within the unit in this case — housekeeping, laundry/valet, bell staff and concierge — share common supervision with 3 other departments in the Rooms Division-PBX, front desk and reservations. R.38:14-18; 248:1-4. The complete organizational structure of HYATT is depicted in CHART 1.

2. Functional Integration

Housekeeping employees perform room service functions by regularly removing trays and dishes from the guest rooms, corridors and elevators. R.173:6-13; 295:12-19; 383:1-8. Engineering employees also perform this function. R.396:17-25. All employees regularly perform the cleaning function of housekeeping throughout the hotel. R.173:15-20; 413-414. Housekeeping and laundry employees sit in and help out PBX. R.441-442.

Front office employees perform room inspections for the housekeeping staff. R.132:15-23. Housekeeping employees regularly deliver departure notices to guest rooms for the front office employees and are frequently in contact with reservations employees. R.420-421.

CHART 1
HYATT Organizational Structure⁸



⁸HYATT EX. 3; those departments found by the NLRB to be in the 1981 unit are in italics.

The housekeeping storeroom supplies items for the convention services and room service departments, a situation unique even with HYATT. R.360-361. The laundry department provides uniforms to all the other employees on a daily basis. R.182:5-7.

Functional integration of all employees is considered essential to the operation of HYATT in order to maintain its standards of excellence in guest service demanded by its clientele. R.251-252; 317-318. This is reflected in a "whatever it takes" attitude of all employees (R. 397-398) which exists throughout all HYATT hotels. R.414-415.

3. Employee Skills and Cross-Utilization

The skill requirement at the entry level positions is the same throughout the Rooms Division. R.270:20-21. All employees from all departments go through the same orientation program together. R.67-68. The *HYATTRAIN* program is available to all employees and is designed to cross-train employees in jobs throughout HYATT to support cross-utilization and promotion from within HYATT. R.506; 581-583.

Between August 4, 1977 (the date of the hearing in the 1977 case) and March 18, 1981, there were 4,125 instances of temporary job transfers by employees between departments of sufficient duration to be documented by the personnel department. HYATT EX. 18. Only 25 occurred within the 1981 unit, while 690 occurred into or out of the 1981 unit—629 of which involved the food and beverage department. *Id.*; VI:977. Testimony proved at least 10,000 undocumented *temporary job transfers per year*. R.579; 593-594.

4. Wages, Hours and Conditions of Work

Virtually every HYATT non-supervisory employee is paid on an hourly basis and is required to sign in and out. R.63;

HYATT EX. 8. The method for offering overtime to employees does not vary from one department to another. R.69:11. All employees have the same report-in pay policy. R.68:21. All employees receive the same annual wage reviews, at the same time. R.65:12-19. All employees are paid on the same payday. **HYATT EX.** 8.

All employees are subject to the same progressive discipline procedures (R.65:2), and all have access to the general manager through the same Open Door Policy. R.68:12; **HYATT EX.** 4.

All employees are given the same Employee Handbook and the same benefit brochures. R.41. All fringe benefits are the same for all employees of HYATT. R.59-60. All employees are subject to the same personnel policies, practices and procedures. *Id.*; **HYATT EX.** 8.

5. Collective Bargaining Patterns and History

There is no history of collective bargaining at this HYATT. However, there is a prior unit determination in which the Board found an overall unit appropriate. *Hyatt Corporation d/b/a Hyatt Regency New Orleans*, NLRB Case No. 15-RC-6147 (1977).

The collective bargaining patterns at other hotels in New Orleans establish only an "all-employee" unit is appropriate. **HYATT EX.** 20 (Fairmont and Bourbon Orleans hotels). The longstanding practice in Region 15 is to grant an overall unit in a hotel (as distinguished from a motel).⁹ Collective bargaining patterns in *all* other major luxury, convention hotels throughout the U.S. prove only an overall unit is appropriate. *Id.*, CHART 3, *infra*.

⁹*Hotel Admiral Semmes*, 127 NLRB 988 (1960).

These and many other facts are more graphically depicted in CHART 2 which compares the 1981 unit to the other units and employees.

Basis For Federal Jurisdiction

The United States Court of Appeals for the Eleventh Circuit had jurisdiction to review and set aside the Order of the National Labor Relations Board pursuant to Section 10 (f) of the National Labor Relations Act, as amended. 29 U.S.C. §160(f).

ARGUMENT AND CITATION OF AUTHORITY

The NLRB Decision Is Contrary to the Law and Facts, and the NLRB Order Should Be Denied Enforcement.

1. *The Unit Selected by the NLRB Is Inappropriate and Exceeds Its Statutory Limits of Discretion.*

- a. The Board's decision is inconsistent with *every* unit determination and collective bargaining unit applicable to luxury, convention hotels in general, and HYATT in particular.

Shortly after it took jurisdiction of the hotel industry, the Board established the rule it would follow in arriving at an appropriate hotel unit. In *Arlington Hotel Company, Inc.*, 126 NLRB 400, 404 (1960), the Board stated:

. . . [I]n the hotel industry, all operating personnel have such a high degree of functional integration and mutuality of interests that they should be grouped together for collective-bargaining purposes.

CHART 2

There Are No Distinct Interests Not Shared By All HYATT Employees¹⁰

DEPARTMENTS		COMMUNITY OF INTEREST FACTORS											
		SALARY RANGE			INTERCHANGE W/ OTHERS			ENTRY L. SKILLS			PHYSICAL CONTACT		
CITATION OF AUTHORITY	HYATT EX. 37	•	•	•	•	•	•	•	•	•	•	•	•
		HYATT EX.s 16, 17, 18	•	•	•	•	•	•	•	•	•	•	•
<i>The Regency Hyatt House, at 1347 R. 121-134, 293, 385, 420, 441</i>	R. 270	•	•	•	•	•	•	X	X	X	X	X	X
	R. 61-62	•	•	•	•	•	•	X	X	X	X	X	X
	R. 59-60,63	•	•	•	•	•	•	X	X	X	X	X	X
	R. 249; HYATT EX. 3	•	•	•	•	•	•	X	X	X	X	X	X
	R. 66-67	•	•	•	•	•	•	X	X	X	X	X	X
	R. 581-582;	•	•	•	•	•	•	X	X	X	X	X	X
	HYATT EX. 36	•	•	•	•	•	•	X	X	X	X	X	X
	VII: 926	•	•	•	•	•	•	X	X	X	X	X	X
	<i>The Regency Hyatt House, at 1347 R. 252, 266-269</i>	•	•	•	•	•	•	X	X	X	X	X	X
	R. 60	•	•	•	•	•	•	X	X	X	X	X	X
<i>The Regency Hyatt House, at 1347 R. 386, 695, 711</i>	R. 60	•	•	•	•	•	•	X	X	X	X	X	X
	R. 63-64	•	•	•	•	•	•	X	X	X	X	X	X
	HYATT EX.s 19, 21-34	•	•	•	•	•	•	X	X	X	X	X	X
	R. 121-122	•	•	•	•	•	•	X	X	X	X	X	X
	R. 293	•	•	•	•	•	•	X	X	X	X	X	X
	R. 69, 293	•	•	•	•	•	•	X	X	X	X	X	X
	HYATT EX. 3	•	•	•	•	•	•	X	X	X	X	X	X
	R. 66; HYATT EX. 4	•	•	•	•	•	•	X	X	X	X	X	X
	R. 364	•	•	•	•	•	•	X	X	X	X	X	X
	R. 65	•	•	•	•	•	•	X	X	X	X	X	X
<i>The Regency Hyatt House, at 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355</i>	HYATT EX. 8	•	•	•	•	•	•	X	X	X	X	X	X
	R. 64; HYATT EX. 4	•	•	•	•	•	•	X	X	X	X	X	X
	HYATT EX. 20	•	•	•	•	•	•	X	X	X	X	X	X
	R. 69	•	•	•	•	•	•	X	X	X	X	X	X
	R. 65	•	•	•	•	•	•	X	X	X	X	X	X
	R. 65	•	•	•	•	•	•	X	X	X	X	X	X
	R. 65	•	•	•	•	•	•	X	X	X	X	X	X
	R. 65	•	•	•	•	•	•	X	X	X	X	X	X
	R. 65	•	•	•	•	•	•	X	X	X	X	X	X
	VII: 923	•	•	•	•	•	•	X	X	X	X	X	X

¹⁰ See Statement of Facts and citations in ARGUMENT AND CITATION OF AUTHORITY, referring to all non-supervisory employees. "X" or "•"

means "same" or "included." The departments included in the smaller 1981 unit are in italics.

The Board continued the application of this rule of inclusion of all operational employees of a hotel, unless a bargaining history of the hotel or the area warranted exclusion. *Ilikai, Inc., and Association of Owners, Ilikai Apartment Building*, 148 NLRB 1264 (1964).

The mid-1960's saw the rise of interstate highways and motel chains. In its bureaucratic effort to pigeonhole the new motel industry into an existing industry, the Board lumped all hospitality facilities into one set of standards. Thus, after six years the Board diluted the *Arlington* case in *John Hammonds and Roy Winegardner, Partners d/b/a 77 Operating Company d/b/a Holiday Inn Restaurant*, 160 NLRB 927 (1966) [hereinafter *Holiday Inn Restaurant*], by stating:

Arlington took a valid principle (*if functions and mutual interest are highly integrated, an overall unit alone is appropriate*) and fashioned from it an inflexible rule to be applied to all hotels and motels. But, because our experience has indicated that such a high degree of integrated functions and employee interest does not exist in every hotel or motel,¹³ we shall hereafter consider each case on the facts peculiar to it in order to decide wherein lies the *true community of interest* among particular employees.

Id., at 930. (Emphasis supplied.)

Thus, the Board provided a vehicle to carve out a smaller than "all employee" unit in a motel where the community of interest factors so indicate.¹⁴ However, the Board continued to group "all operating personnel" together for collective bar-

¹³"A business may operate in such a manner as to depend substantially on other than room guests. Here, for example, the restaurant corporation also provides club rooms and banquet facilities. Nor does it seem that the motel provides complete restaurant facilities primarily for its relatively few room guests." *Holiday Inn Restaurant*, at 929.

gaining purposes where they had a "high degree of integrated function and employee interest" in a hotel.

In 1967, the Hyatt Regency Atlanta opened as the first Hyatt Regency Hotel and the flagship of Hyatt Hotels Corporation. In 1968, the Board had the opportunity to render its landmark decision in *Hotel Equities, d/b/a The Regency Hyatt House*, 171 NLRB 1347 (1968) [hereinafter referred to as *The Regency Hyatt House*].

At issue was the inclusion or exclusion of office clerical personnel from a unit consisting of all operating employees of the hotel. *The Regency Hyatt House* Board found an "overall unit to be appropriate"¹² and clearly acknowledged that, in *Holiday Inn Restaurant*, it did not reverse its policy of including all manual operating employees in an overall unit in such a highly integrated hotel as HYATT. Rather, it stated its intention was "to weigh and balance all factors in arriving at a unit determination."¹³

The Regional Director's "unit determination" in *The Regency Hyatt House* attempted to discount evidence of nationwide practices.¹⁴ The Board, on the other hand, found such evidence significant. Furthermore, the NLRB held the hospitality industry evidence controlling as to the inclusion of job categories in the unit.¹⁵ Thus, the Board continued to apply the nationwide principle of "all employee" units in the luxury hotel industry, particularly as applied to HYATT and Hyatt Regency hotels.

¹² *The Regency Hyatt House*, at 1359.

¹³ *Id.*, at 1348.

¹⁴ *Hotel Equities, d/b/a The Regency Hyatt House*, NLRB Case No. 10-RC-7169, at p. 6, n.22. HYATT EX. 20.

¹⁵ *The Regency Hyatt House*, at 1349, n.8.

Another HYATT in the Southeast provided the backdrop for the most thoroughly litigated hotel unit determination in America prior to the instant case. *Hyatt Corporation, d/b/a Orlando Hyatt House*, NLRB Case No. 12-RC-5112 (1976); *Hyatt Corporation, d/b/a Orlando Hyatt House*, NLRB Case No. 12-RC-5344 (1977) [hereinafter *The Orlando Hyatt House*].

There are at least 20 significant similarities between the *Orlando Hyatt House* (1977) and this case. See VII: 777-779. However, the facts in the two *Orlando Hyatt House* cases remained the same and the Regional Director of Region 12 always found an "all-employee" unit appropriate.¹⁶

The evidence adduced at the unit determination hearing in the instant case demonstrated the following:

- (1) The established Board precedent in the United States is to have an "all-employee" unit in a major luxury, convention hotel or resort;
- (2) All hotels and hotel associations in major U.S. cities engaged in collective bargaining have "all-employee" units;¹⁷
- (3) HYATT has numerous collective bargaining agreements throughout the United States, *all* of which,

¹⁶The facts in the *Orlando Hyatt House* (1977) are identical to those in the instant case, and the decision of the Regional Director for Region 12 is worth reading and considering in light of the facts in the instant case. See VII: 775-776.

¹⁷Atlanta, Atlantic City, Baltimore, Boston, Chicago, Cincinnati, Detroit, Honolulu, Indianapolis, Jacksonville, Kansas City, Las Vegas, Los Angeles, Miami, Minneapolis, New Orleans, New York, Philadelphia, San Diego, San Francisco, Seattle, Washington, D.C. HYATTEX. 20. See generally A. Stokes, THE COLLECTIVE BARGAINING HANDBOOK FOR HOTELS, RESTAURANTS, AND INSTITUTIONS (CBI Publishing Co., Boston, 1981).

consistent with its labor relations policies, are "all-employee" units;¹⁸

- (4) Other HYATTS throughout the United States which do not have collective bargaining relationships, have been the subject of representation proceedings in which *only* "all-employee" units have been found by the Board;¹⁹
- (5) All other representation proceedings at HYATT Hotels in the Southeastern United States (Alabama, Florida, Georgia, Louisiana and Tennessee) have resulted in "all-employee" units;²⁰
- (6) The history of unit determinations at hotels in Region 15 is to find *only* "all-employee" units;²¹
- (7) The collective bargaining experience at other major hotels in New Orleans has produced *only* "all em-

¹⁸Hyatt Regency Atlanta, Hyatt Riviera (Atlanta), Cherry Hill Hyatt House, Hyatt Regency Dearborn (Detroit), Hyatt Regency San Francisco, Hyatt on Union Square, Hyatt Regency Waikiki (which is in the same bargaining unit as the Ilikai Hotel, *supra*).

¹⁹Hyatt Lake Tahoe [*Hyatt Corporation, d/b/a Hyatt Lake Tahoe*, NLRB Case No. 20-RC-12749 (1975)]; Hyatt Regency Memphis [*Hyatt Hotels Corporation, d/b/a Hyatt Regency Memphis*, NLRB Case No. 26-RC-6418 (1981)] and all HYATTS listed *infra*, note 20. In the case of *Hyatt Regency Phoenix*, 256 NLRB 1099 (1981), *enforced*, 692 F.2d 673 (9th Cir. 1982), the Board granted a petition for unit of craft employees to a craft union. 29 U.S.C. §159(b).

²⁰Hyatt Regency Atlanta [*The Regency Hyatt House*] 1968; Birmingham Hyatt House [*The Civic Center Motor Hotel Ltd., d/b/a a Birmingham Hyatt House*, NLRB Case No. 10-RC-10682 (1976)]; Orlando Hyatt House (1976, 1977), *supra*; Hyatt Regency New Orleans (1977), *supra*, Hyatt Regency Memphis (1981) note 23, *supra*.

²¹*Hotel Admiral Semmes*, 127 NLRB 988 (1960) (Case No. 15-RC-2108); *Hyatt Hotel Corp. d/b/a Hyatt Regency New Orleans*, NLRB Case No. 15-RC-6147 (1977).

ployee" units;²² and

- (8). The prior collective bargaining unit at *this HYATT* was an "all-employee" unit.²³

The NLRB's decision is logically inconsistent within itself, and it is based upon factually dissimilar and illogical "precedent." Moreover, the NLRB's decision is inconsistent with every unit determination and collective bargaining unit applicable to luxury, convention hotels in general, and HYATT in particular.

b. There are no distinct, shared interests among employees in the unit certified which are not shared by all employees of HYATT.

It is the duty of the Board through its Regional Directors to "consider each [representation] case on the facts peculiar to it in order to decide wherein lies the true community of interest among particular employees." *Holiday Inn Restaurant*, at 930. The following factors were either not considered by Regional Director Lewis, or considered incorrectly on the facts of the case and not distinguished from facts relevant to other employees at HYATT or facts found to be the same in the 1977 unit determination:

1. Collective Bargaining History. Regional Director Lewis failed to discuss or analyze any collective bargaining patterns impacting upon HYATT, including: the 1977 unit determination; prior hotel unit determinations in Region 15; collective bargaining patterns at similar hotels in New Orleans; similar

²²Bourbon Orleans, Ltd., Collective Bargaining Agreement; Fairmont Hotel Collective Bargaining Agreement.

²³*Hyatt Corporation d/b/a Hyatt Regency New Orleans*, NLRB Case No. 15-RC-6147 (1977), patterned after the unit in *The Regency Hyatt House*.

units in HYATT throughout the United States; patterns of collective bargaining at HYATTs throughout the United States; and patterns of collective bargaining throughout the major luxury, convention hotel industry in the Southeast and the United States. Such analysis is required. *NLRB v Purnell's Pride, Inc.*, 609 F.2d 1153 (5th Cir. 1980).

2. Determination of Labor Relations Policy. Employees throughout all departments and divisions at HYATT are affected by the same labor relations policy which cannot be compartmentalized. Moreover, many of these policies are HYATT policies corporatewide. *See generally* R.59-60; HYATT EX.s 4, 8, 13, 36.

3. Continuity of Production Processes. The overall concept of total-guest-service at a major luxury, convention hotel is one of the most important distinguishing features of HYATT, and yet was completely ignored by the Regional Director. The record evidence is overwhelming that employees in the 1981 unit are but a part of the overall continuity of *total-guest-services* at HYATT. *No individual, department, or division could function without the contribution and total functional integration of all employees from all departments and divisions.* *See* R.184, 249, 252, 317-318, 414, 549.²⁴

4. HYATT's Organizational Structure. HYATT's organizational structure is such that all employees share only one common supervisor—the General Manager. The unit found by the Regional Director does not comport with the organizational structure of the employer. HYATT EX. 3; CHART 1, *supra*.

5. Manual Operating Employees. The Regional Director included housekeeping and laundry/valet employees (failing to compare bell staff and concierge employees) on the basis of per-

²⁴Factors 2-3 are considered substantial issues relating to the "community of interest." R. Gorman, *BASIC TEXT ON LABOR LAW* 69 (1976).

formance of "simple manual tasks." However, the Board has consistently described an appropriate unit for HYATT as consisting of "all manual operating employees," including those "preparing or serving food or beverages." *The Regency Hyatt House*, at 1349.

6. Benefits and Personnel Policies, Practices and Procedures.

The Regional Director only stated that the 1981 unit employees shared in the same fringe benefits. VII:926. The record evidences that *all* non-supervisory employees at HYATT share in the same benefits *and* the same personnel policies procedures. R.59-60; HYATT EX. 8.

7. Orientation and Training. The Regional Director found that only "certain" employees attended HYATTRAIN courses. VII:925. However, the only evidence is that *all employees* may participate in such training programs, as well as other educational assistance programs (R.581-583), and that these unit employees who participated in such programs benefitted from them. R.564-566.

The Regional Director also found that *all* employees participated in a "general orientation program at the time of hire," attending same with employees from *all other departments*, and that *all* employees are specifically trained for their positions "by means of on-the-job training and mandatory monthly meetings." VII:926.

8. Uniforms. The Regional Director found that "[h]ouse-keeping employees wore distinctive departmental uniforms...." VII:929. However, *all* manual employees in the departments found to be within the unit, as well as in *all* other departments, wear distinctive uniforms. R-61. Name tags are also worn by *all* HYATT employees. R.59-60, 63.

9. Common Supervision. The Regional Director distinguished the 1981 unit from all other employees based upon "separate supervision." VII:929. However, each of the four

departments within the unit has "separate supervision." Further, the only common supervision shared by the departments in the units is that of the Executive Assistant Manager, Rooms, who supervises the other departments. CHART 1, *supra*. The next level of common supervision of all these employees is the General Manager, who supervises all HYATT employees. R. 554.

10. Method of Computation of Wages. The Regional Director gave similarity in the method of computation of wages as a basis for his determination. VII:929. However, almost all non-supervisory employees are paid on an hourly basis. R.63; CHART 2. Moreover, bell staff employees, like many employees in the food and beverage departments, are tipped employees and are paid less than the minimum wage based upon a tip credit.

11. Physical Contact and Areas of Work. The unique physical structure of HYATT establishes physical contact between housekeeping and other employees not normally found in other hotels. R.385. All employees at HYATT have daily contact with each other throughout the Hotel, whether in the employee cafeteria, employee locker room, common employee timeclock, or moving about through the Hotel. Moreover, some employees in the 1981 unit have greater contact with employees outside the unit than with other employees within the unit.

12. Functions and Functional Integration. The Regional Director found "a close functional integration between housekeeping, laundry/valet, concierge and bell staff departments" but did not find such functional integration between the 1981 unit and other departments. VII:925. However, the "voluminous" unrebutted facts and documents of HYATT on this point were neither weighed nor analyzed. Moreover, the testimonial evidence is replete with examples of functional integration among *all departments*, not just within the NLRB's 1981 unit.

13. Skills. The Regional Director referred to both housekeeping and laundry/valet employees as being "unskilled" em-

ployees. VII:925, 926. Yet he made no correlation between these employees and either (a) other employees in the 1981 unit (bell staff and concierge), or (b) other HYATT employees, particularly in the rooms division, all of whom have identical skills. R.270.

14. Interchange of Employees. The Regional Director found infrequent interchange or transfer between the 1981 unit departments and other departments. VII:925. However, there were 4,125 documented temporary transfers at HYATT between the 1977 and 1981 unit determinations, 715 of which involved the 1981 unit. Fully 97% of the transfers involving the 1981 unit were into and out of the 1977 unit—the vast majority involving Food and Beverage. HYATT EX. 18.

15. Low Wage Workers. The Regional Director stated: "Housekeeping personnel are among the lowest paid hourly workers . . ." VII:926. However, he did not discuss whether this "fact" distinguished housekeeping employees from other employees either within or with out the 1981 unit. However, the "highest hourly wage" in the housekeeping and laundry/valet departments is as high, or higher, than the highest hourly wage in all other HYATT departments. When housekeeping personnel are compared to others on a basis of medium income they are more highly paid than most employees both in and out of the 1981 unit. HYATT EX. 37.

Therefore, there are no distinct, shared interests among the employees in the 1981 unit which are not shared by all HYATT employees, who would, *a fortiori*, be included in an appropriate bargaining unit. Only an "all employee" unit consisting of all manual operating employees would be consistent with history practice, the stated Board position regarding Hyatt Regency Hotels, and the facts particular to this HYATT.

2. The NLRB Violated the Administrative Due Process Rights of HYATT and Its Employees.

- a. The NLRB reversed the prior HYATT unit determination in violation of its own administrative decisions, and the NLRB's reversal cannot withstand the judicial scrutiny of this Court.

In 1977 the Board found an appropriate unit at HYATT to be an "all-employee" unit patterned after the unit at the Hyatt Regency Atlanta. The 1981 decision by Regional Director Lewis found a totally different unit to be appropriate for collective bargaining purposes at HYATT, completely altering the prior unit determination.

"Absent sufficiently compelling reasons therefore, the Board will not override a prior unit determination." *National Car Loading Corp.*, 167 NLRB 801, 803, (1967) (emphasis supplied). Otherwise stated, the Board, as a matter of policy, will not alter a prior unit determination absent *compelling circumstances*. *Baltimore Transit Co.*, 92 NLRB 688 (1950). Even though a prior unit determination is not conclusive, that prior determination will be given greater weight in later representation proceedings. *Montgomery Ward & Co.*, 87 NLRB 254 (1949); *Sensenich Bros.*, 55 NLRB 506 (1944).

The Eleventh Circuit did not address the multitude of factual errors by the Regional Director and cited *NLRB v. Alterman Transport Lines, Inc.*, 465 F.2d 950 (5th Cir. 1972), for the proposition that a "redetermination of material facts" could be made by the Board after the passage of a number of years. However, in *Alterman* the Court required the Board to set out a detailed opinion containing its reasons for including or excluding each class of employees in question. *Id.*

Further, the Board policy of upholding prior unit determinations has been not only recognized by the Courts but followed in the hospitality industry. In *Holiday Inns, Inc., d/b/a Holiday*

Inn Memphis—Rivermont, NLRB Case No. 26-RC-4698 (1974), the Board cited *National Carloading Corp.*, *supra*, with approval in finding an "all employee" unit based upon a prior "all employee" unit determination at the same facility.

In an identical case involving the Orlando HYATT the Board has applied this policy to HYATT. *Hyatt Corporation d/b/a Orlando Hyatt House*, NLRB Case No. 12-RC-5344 (1977), Appendix A-8.

While it is well recognized that the Board has broad discretion in making a unit determination, such determination may not be "arbitrary, capricious and an abuse of discretion, or lacking in substantial evidentiary support." *NLRB v. J.C. Penney Co.*, 559 F.2d 373, 375 (5th Cir. 1977). The Regional Director's decision in this case is totally lacking in the *substantive analysis* required by the Courts. *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153 (5th Cir. 1980).

b. HYATT employees determined to be within the appropriate unit in 1977 were not permitted to vote, even by challenged ballot, in the 1981 election.

Although the Board has been given administrative authority and discretion over determining the appropriate bargaining unit, the principles governing unit determinations require that this authority be used to "assure to employees the fullest freedom in exercising the rights guaranteed by this Act . . ." 29 U.S.C. §159(b). See also, *NLRB v. Corry Foam Products Co.*, 489 F.2d 807, 808 (6th Cir. 1973).

These rights include the right to vote. 29 U.S.C. §157. Thus, while it is recognized that employees have the right to engage in concerted activities, it is often overlooked that they also have the right to refrain from such activities. Fundamental to these rights is the right to vote by secret written ballot.

Commensurate with these rights, HYATT has sought throughout these proceedings not to disenfranchise employees, as the Board has to some 850 individuals. Since the avoidance of disenfranchisement is the major policy behind the Board mandate not to set aside a prior unit determination at a particular hotel absent "compelling circumstances" or "substantial reasons," HYATT sought to permit those given the right to vote in 1977, to vote in 1981, even pleading that the Board preserve their Section 7 rights by the challenged ballot procedure. 29 U.S.C. §157.

There Is an Established Policy of "All Employee" Units Consisting of All Manual Operating Employees In Highly Integrated Luxurious, Convention Hotels Such As HYATT.

The first hospitality case addressed by the NLRB presented the issue of an appropriate unit for collective bargaining purposes in a highly integrated hotel operation. The facts in the instant case are virtually identical to the facts in *Arlington Hotel Company, Inc.*, 126 NLRB 400 (1960), wherein the Board stated, at 403:

. . . some employees whom the Petitioner would include are under the same supervision as some it would exclude.

. . .

Further, there is a high degree of cooperation among all the employees and integration of all the departments, in the common goal of serving the hotel guests . . . All employees, moreover, work in the same building, are centrally hired, and share in the same fringe benefits.

(Emphasis supplied.)

In attempting to apply this standard to the motel industry in

Holiday Inn Restaurant the Board did not change this policy, it merely permitted itself the luxury of examining the facts in each particular case to accommodate a smaller unit in a motel operation. Indeed, the Board continued to find only "all employee" units in highly integrated hotel operations, and specifically designated such a unit in *The Regency Hyatt House*, which it had consistently followed at other Hyatt Hotels including the 1977 units at HYATT.

At least one Circuit Court of Appeals has continued to follow this established policy, notwithstanding *Holiday Inn Restaurant*, unless there is a well defined area bargaining practice to the contrary. *Atlas Hotels, Inc. v. NLRB*, 519 F.2d 1330 (9th Cir. 1975); *Ramada Inns, Inc. v. NLRB*, 47 F.2d 1334 (9th Cir. 1973); *Westward-Ho Hotel Co. v. NLRB*, 437 F.2d 1110 (9th Cir. 1971).

Other circuits have addressed this issue, but only in motel or nonintegrated hospitality operations where the facts demonstrated a situation totally different from HYATT's highly integrated luxury, convention operation. *Holly's Inc. d/b/a Holiday Inns South*, 653 F.2d 238 (6th Cir. 1981).

The determination of an appropriate bargaining unit is necessary to affectuate the statutory policy of efficient collective bargaining. *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). As the Court stated in *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980):

"... The designation of a small unit that excludes employees with common skills, attitudes, and economic interests may unnecessarily curtail the union's bargaining power and may generate destructive factionalization and end fighting among employees."

What the Board did in this case was to carve out a unit similar to that requested by the petitioning union in violation of 29

U.S.C. §159(c)(5), and contrary to the facts in this particular case and the standard previously applied by the Board to HYATT.

The NLRB Must Assign a Relative Weight to Each of the Competing Factors It Considers, Analyzed in Light of the Policies Underlying the "Community of Interest" Test, and Support Its Appraisal of the Significance of Each Factor.

The "community of interest" among employees is crucial to the determination of an appropriate bargaining unit. At least one Circuit in our case has required such a *substantive analysis* where the Regional Director's decision in our case failed to weigh and analyze the facts in the case, making "stock" statements commonly used in such decisions, to carve a small unit as petitioned for by the union out of a larger integrated operation. *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153 (5th Cir. 1980). The statement of the Fifth Circuit, at 1156-57, is equally applicable to the instant case:

This determination demands that the Board do more than simply tally the factors on either side of a proposition. The crucial consideration is the weight or significance, not the number, of factors relevant to a particular case. So as to permit proper judicial review, the Board must assign a relative weight to each of the competing factors it considers. The unit determination will be upheld only if the Board has indicated clearly how the facts of the case, analyzed in light of the policies underlying the community of interest test, support his appraisal of the significance of each factor.

Such analysis becomes even more crucial where the Board is seeking to reverse a prior unit determination finding an "all-employee" unit based upon *The Regency Hyatt House* at the same HYATT. While it is recognized that there may be more

than one appropriate unit at one facility, the Courts "are not convinced that merely because the Board at the urging of the union, has made two conflicting determinations, that this shows conclusively that there are two appropriate units in one facility." *May Department Stores Co. v. NLRB*, 454 F.2d 148, 150 (9th Cir. 1972). *There must be significant change and the Board must explain its departure from its earlier decisions involving same and comparable facilities, properly analyzing the various competing factors regarding the underlying "community of interest."* *Id.*, at 150-151.

The Board in the instant case did not correctly analyze the factors underlying the "community of interest" at this HYATT as required by *Purnell's Pride, Inc., supra*. Further, neither the Board nor the Eleventh Circuit addressed and analyzed the requirement for a finding of "substantial change" in the facts to reverse a prior unit determination at HYATT. Thus, there has been a misapprehension or gross misapplication of the facts in this case requiring the intervention of the Supreme Court. *Golden State Bottling Co., Inc., v. NLRB*, 414 U.S. 168 (1973).

CONCLUSION

HYATT seeks to further the purposes of the National Labor Relations Act, not frustrate it, by petitioning this Honorable Court. Many Hyatts throughout the United States are unionized and Hyatt engages in collective bargaining negotiations with the duly certified representative at each of these hotels. However, the service to the guests of all HYATT, and the hotel and corporatewide "all-employee" personnel policies, practices and procedures, as well as the purpose and intent of the Act, are frustrated and damaged by the Board's decision in this case.

There is an established policy of "all-employee" units for all manual operating employees in highly integrated hotel operations, as specifically applied by the Board to HYATT. *The Regency Hyatt House, supra*. Moreover, the Board failed to weigh and analyze the competing factors underlying the "community of interest" in support of its decision (*Purnell's Pride, Inc., supra*), and failed to demonstrate any "substantial change" to justify the reversal of the prior "all-employee" unit at this HYATT. *May Department Stores Co., Inc., supra*.

For all of the foregoing reasons, arguments and authorities, it is respectfully submitted that this Court should grant the Petition of Petitioner and issue a *writ of certiorari* to the United States Court of Appeals for the Eleventh Circuit to review and to set aside the NLRB's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Arch Stokes, do hereby certify that I have this date served three (3) copies of the foregoing Petition upon the following person by depositing said copies in the United States Mail, properly posted and addressed to:

The Honorable John C. Truesdale
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Room 701
Washington, D.C. 20570
ATTN: JOLANE A. FINDLEY, ESQUIRE

This _____ day of November, 1983.

ARCH STOKES
Counsel for Hyatt Hotels Corporation

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-8146

HYATT HOTELS CORPORATION, d/b/a
HYATT REGENCY NEW ORLEANS,

Petitioner,
Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent,
Cross-Petitioner.

Petition for Review and Cross Application
for Enforcement of an Order
of the National Labor Relations Board

(June 21, 1983)

Before HATCHETT and CLARK, Circuit Judges,
and SCOTT,* District Judge.

*Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, was a member of the panel that heard oral arguments but due to his death on May 12, 1983 did not participate in this decision. 28 U.S.C. §46(d).

PER CURIAM:

Hyatt Hotels Corporation seeks review of a National Labor Relations Board order directing it to bargain collectively with United Labor Unions, Local 100, to cease and desist certain unlawful practices, to provide requested information, and to post an appropriate notice. The Board filed a cross-application for enforcement of its order. Because we find the order appropriate under the circumstances, we grant enforcement.

The Hyatt Hotel in question is a luxury convention hotel in New Orleans, Louisiana. No history of collective bargaining exists, although in 1977 a unit determination was made which included all full-time and regular part-time employees—an all manual employee unit.¹ Record Vol. 2 at 1014-1019. On March 16, 1981, United Labor Unions, Local 100, filed a representation petition with the Board seeking certification as the exclusive bargaining representative of employer's full-time and regular part-time employees in housekeeping and laundry/valet departments. At the representation hearing, the employer opposed the unit as inappropriate.² The Regional Director determined the unit to be as the union requested with the addition of the concierge and bell staff departments. Ultimately, the unit was found to consist of all regular employees in the four above-mentioned services. A Board election was held and the union

¹The front office, office clerical, guards, supervisors, professionals, PBX and reservations were excluded from coverage. Record Vol. 1 at 374. The union, Hotel, Motel, and Restaurant Employees Union, Local 166, AFL-CIO, was never certified as the exclusive bargaining representative.

²Hyatt introduced the evidence used in the 1977 unit determination. See Record Vol. 1 at 7. Hyatt also opposed the union as outside the meaning of "labor organization" as defined in Section 2(5) of the National Labor Relations Act, 29 U.S.C. sec. 152(5) (1973). The Regional Director found against employer on the status of the union. This issue is not before us on appeal.

was duly certified.³

Contesting the appropriateness of the unit, the employer refused to bargain with or supply requested information⁴ to the union.⁵ The union filed unfair labor practice charges and General Counsel filed a complaint. Respondent filed an answer denying all of the allegations in the complaint. A hearing was set before an administrative law judge, and on December 14, 1981, General Counsel filed a motion to transfer and for summary judgment before the Board.

The Board issued an order transferring the proceeding to the Board and issued an order of Notice to Show Cause why no summary judgment should enter. Respondent filed separate responses to the motion for summary judgment and the Notice to Show Cause. General Counsel also filed a supplement to the motion for summary judgment. Finding a violation of sections 8(a)(1) and (5) of the National Labor Relations Act, the Board

³Hyatt filed objections to the election asserting that the now-excluded employees in the prior 1977 unit should be allowed to cast challenged ballots and that certain terminated employees were wrongfully permitted to vote. The Regional Director overruled the objections and certified the union. Hyatt requested review with the Board. The Board denied Hyatt's request.

⁴The union requested information regarding the names, addresses, telephone numbers, dates of hire, job classifications and rates of pay of all bargaining unit employees; a breakdown of the bargaining unit by departments and job classifications; descriptions of all fringe benefits including but not limited to vacations, holidays, leaves of absence, sick leave, bereavement pay, jury duty pay, sickness and accident insurance, and pensions; description of overtime policies including daily overtime pay, conditions for refusal of overtime, and division of overtime; description of layoff and recall policies; description of seniority policies, including their application to benefits; description of disciplinary policies; and all work rules.

⁵Refusing to bargain is the appropriate procedure for contesting the Board's decision here. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 61 S.Ct. 908, 85 L.Ed. 1251 (1941).

granted summary judgment on the grounds that Hyatt was refusing to bargain based on the issues previously litigated in the representation hearing⁶ and that the employer had not offered to adduce any new or previously unavailable evidence requiring the Board to reexamine its decision. 260 NLRB No. 66 (1982).

The pivotal issue in this case is whether the Board's unit determination was appropriate under the circumstances.⁷ A strict standard of review is afforded to unit determinations. "[T]he selection of an appropriate unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed.'" *South Prairie Construction Co. v. Local 627, I.U.O.E.*, 425 U.S. 800, 805, 96 S.Ct. 1842, 1844, 48 L.Ed.2d 382, _____ (1976) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491, 67 S.Ct. 789, 793, 91 L.Ed.2d 1040, _____ (1947)).

The Board is not required to find the *most* appropriate unit but only a unit within the range of units appropriate under the circumstances. *NLRB v. J.C. Penney Co.*, 559 F.2d 373, 375 (5th Cir. 1977). The employer carries the burden of showing that the unit selected is "clearly not appropriate" by establishing a lack of community interest among the unit selected. Factors to be considered in assessing community of interest include common supervision, similarity in job function, operational integration, geographic proximity, degree of employee interchange, and bargaining history. *Id.*

In the instant case, we find that substantial evidence on the record as a whole supports a finding of community interest in the designated unit and that an all manual employee unit is not mandated. Admnistratively, the four departments constituting

⁶Hyatt continued to contest the appropriateness of the unit determination.

⁷Section 9(b) of the National Labor Relations Act grants the Board the power to determine the appropriate unit for collective bargaining. 29 U.S.C. sec. 159(b) (1973).

the approved unit are all within the Rooms division of the hotel. While each department has separate immediate supervision, the next level of supervision is the same. The non-unit departments within the Rooms division include front desk, reservations, and PBX (telephone attendant). These non-unit employees perform basic office clerical functions while the unit employees perform unskilled manual functions. Unit employees have a high degree of functional integration. Daily contact between unit and non-unit employees is much less.⁸ Decision and Direction of Election at 4-7 n.6. No history of collective bargaining exists at this Hyatt. Record Vol. I at 17.

Hyatt argues that all luxury convention hotels in New Orleans and all other unionized Hyatts have all employee units. Apparently, the potential harm in anything less than an all employee unit is that a smaller unit would operate against the Hyatt philosophy of doing whatever necessary to please the guests. Record Vol. 2 at 185-86. The Board refutes that it has only certified all employee units in other luxury convention hotels. The Board first notes that when Hyatt refers to an all employee unit, it really means a broader manual employee unit which still excludes front office and clerical personnel. The Board then notes that even an all manual employee unit is not always found, citing *Hyatt Regency Phoenix*, 256 NLRB 1099 (1981), enforced, ____ F.2d ____ (9th Cir. 1982), where a unit of engineering and maintenance employees was found appropriate.⁹ See also *Arcadian Shores, Inc., d/b/a Myrtle Beach Hilton v. NLRB*, 580 F.2d 118 (4th Cir. 1978) (unit composed of housekeeping, laundry, and bell staff employees but excluding restaurant employees appropriate). The Board also notes that where an all manual employee unit has been found, the union petitioned for such a unit or the parties consented to

⁸Non-unit employees outside the Rooms division include Food and Beverage, Accounting, Convention Services, Public Relations, Sales, Personnel, Engineering, and Security.

⁹Hyatt would distinguish this case as involving a craft unit.

it. The Board maintains that it has never drawn the distinction urged by Hyatt between luxury convention hotels and other hotels and motels but, rather, applies a case-by-case approach in making unit determinations. *John Hammonds & Roy Winegardner, Partners, d/b/a 77 Operating Co., d/b/a Holiday Inn Restaurant*, 160 NLRB 927 (1966), *enforced*, 387 F.2d 646 (4th Cir. 1967). Thus, the unit certified is an appropriate unit.

Hyatt maintains that even if the smaller unit might be within the realm of appropriate units, this unit determination cannot stand because it conflicts with the 1977 determination of all manual employees and the Regional Director failed to justify the change. We disagree. An extensive fact-finding hearing was held.¹⁰ A detailed and reasoned opinion issued in which the Regional Director noted the prior determination and the changed circumstances permitting redetermination. Decision and Direction of Election at 2-3 n.4. Several years had intervened between determinations.¹¹ We reiterate also that the former unit determination was the unit petitioned for by the union, did not result in collective bargaining, and involved a different union. Thus, based on the record before the Board, no abuse of discretion occurred.

Hyatt also argues that the Board allowed the union's interest to be controlling in violation of section 9(c)(5) of the National Labor Relations Act, 29 U.S.C. sec. 159(c)(5).¹² The union, however, stated that it would seek to represent a more expansive unit if the Regional Director found a broader unit to be

¹⁰A supplemental hearing on voting eligibility was also held.

¹¹"There is no rule which prevents the redetermination of material facts by the NLRB, especially after the passage of a number of years." *NLRB v. Alterman Transport Lines, Inc.*, 465 F.2d 950, 952 (5th Cir. 1972).

¹²Section 9(c)(5) of the National Labor Relations Act provides in part that "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29 U.S.C. sec. 159(c)(5) (1973).

appropriate. Record Vol. I at 142. Moreover, the unit designated by the Regional Director is, in fact, larger than the one petitioned for by United Labor Unions. Decision and Direction of Election at 8 n.10. The Board may give weight to the extent of union organization. *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 441-42, 85 S.Ct. 1061, 1063, 13 L.Ed.2d 951 (1965); *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 188, 120 (4th Cir. 1978); *NLRB v. Alterman Transport Lines, Inc.*, 465 F.2d 950 (5th Cir. 1972). "The Board's determination is clearly not void merely because it coincides with the extent of organization." *Alterman Transport*, 465 F.2d at 952.

Hyatt also cites as error the refusal to allow employees in the previous unit to vote at least a challenged ballot. Hyatt submits that such conduct by the Board violates its and its employees' administrative due process rights. That argument is meritless. The correct procedure for determining an appropriate unit was followed. Non-unit employees are not precluded from organizing if they so desire. The Board's findings in this and Hyatt's other contentions are supported on the record as a whole. Accordingly, the order is enforced.

ENFORCEMENT GRANTED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-8146

HYATT HOTELS CORPORATION, d/b/a
HYATT REGENCY NEW ORLEANS,

Petitioner,
Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent,
Cross-Petitioner.

Petition for Review and Cross Application
for Enforcement of an Order
of the National Labor Relations Board

ON PETITION FOR REHEARING AND SUGGESTION
FOR HEARING *EN BANC*

(Opinion June 21, 11 Cir., 1983, ____ F.2d ____).

(August 25, 1983)

Before HATCHETT and CLARK, Circuit Judges,
and SCOTT,* District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing *En Banc* is DENIED.

ENTERED FOR THE COURT:

Thomas A. Clark, United States Circuit Judge

*Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, was a member of the panel that heard oral arguments but due to his death on May 12, 1983 did not participate in this decision. 28 U.S.C. §46(d).

STATUTE INVOLVED

National Labor Relations Act, as amended, (61 Stat. 136,
73 Stat. 519, 29 U.S.C., Sec. 151, et seq.)

Section 7. Employees shall have the right to self-organization; to form, join or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in subsection 8(a)(3).

Section 9(b). The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if

such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Section 9(c)(5). In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.